No. 02-1739

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIE YOUNG, a.k.a. Punchie,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENTS OF REPLY

In its brief in opposition, the government states, "Both Thompson and the petitioner sold the drugs to Katrina Johnson, a government confidential informant...." Resp. 2. The record shows that many people sold drugs to Katrina Johnson, but the record also shows that Thompson and Young did not act in concert. The undercover-recorded conversations in the instant case conclusively showed that Thompson and Young acted independent of each other and without knowledge of each other's illegal activities. Thompson is recorded saying that he will not do business with Young, he advises Johnson to stay away from Young because Young is a thief, and Thompson expressly stated that he does not let Young know about his drug dealings. Trial Tr. 48, 49, 52. Indeed, based in part on these undercover-recorded conversations, Young was acquitted by his jury of conspiring with Thompson, Brownlee and the others charged. Throughout its brief, the government bends the evidence in a light most favorable to itself, even though the jury rejected the charge of conspiracy as to Young.

In like manner, the government incorrectly suggests in its brief that on May 24, 1996 Thompson had hand-delivered the small package of heroin to Young, which Young later delivered to Johnson on that date. Resp. 3. The evidence at trial is contrary to that assumption. A surveillance video on May 24, 1996 shows Young greeted Thompson, as Thompson drove into the restaurant parking lot. Trial Tr. 60. The video does not show that Thompson handed anything to Young. This video shows that a short time after Young

and Thompson exchanged greetings, Johnson drove into the parking lot. Young obtained the buy money from Johnson ($6,000), and then Young drove out of the parking lot with the buy money to return in seven minutes with the purported ounce of heroin sold to Johnson. Trial Tr. 62, 63, 64, and 168. While Young drove away from the restaurant, Thompson and Brownlee remained at that location. Trial Tr. 62 and 560. This transaction (involving one ounce of heroin), was not shown to have anything to do with Thompson or Brownlee, consistent the jury's acquittal of the conspiracy charge against Young.

The government asserts that Thompson identified Young in a recorded conversation as "one of Brownlee's henchmen." Resp. 4. In truth, the transcript of the relevant recorded conversation reveals that Thompson spoke of "this flunky" that was used to scare Johnson. Trial Tr. 497. Johnson did not testify at trial. Instead, DEA Agent Wright opined that "this flunky" may have been Young. Trial Tr. 498. On cross-examination, Agent Wright admitted that Thompson never identified "this flunky" as "Punchie" or Young. Trial Tr. 509. Again, the government stretches the evidence, as if the jury verdict supported its conspiracy theory, which it plainly rejected.

In the government's brief opposition, reference is made many times to the undercover recorded conversation of Thompson made on April 3, 1996, which was played for the jury. See Pet. App. 90-101 (Young I). Notwithstanding the government's interpretation of this conversation in its appellate briefs, the actual recorded statements of Thompson do

not indicate that Patterson (a.k.a. Baybro) bought ten kilograms of cocaine from Brownlee or any other co-defendant or that Thompson's regular two kilograms per month sales to Patterson for a fifteen month sale occurred between July 1994 and October 1995. In fact, the transcript identifies no dates when these transactions may have occurred. Moreover, Thompson identifies the source of supply of this cocaine as "the Cuban." Neither Brownlee or Young or any other person identified as a codefendant in this case was known as "the Cuban." Further, without a date indicated, only speculation could allow the jury to find that this activity occurred during the time periods relevant to the indictment. Not only did the jury find that this evidence did not support the conspiracy charged (as revealed by the acquittal), but the Eleventh Circuit in Young I held that there was no evidence at trial or at the sentencing to substantiate the PSR calculation of 50 kilograms attributed to Young as relevant conduct in the conspiracy for which Young was found not guilty. Pet A-5.

The government's assertion that Young had a prior relationship with Patterson does not factor in the calculus to determine whether sufficient evidence existed to substantiate the PSR statement regarding the 50 kilograms attributed to Young as relevant conduct. First, this hearsay "evidence" was introduced as part of the "second bite of the apple" after Young I, at the second sentencing hearing. Second, prior to that second sentencing hearing Patterson admitted to the defense counsel, in the presence of the prosecutor, that to his knowledge Young never actually possessed any illegal drugs. Sent. Tr. 86 (May 2, 2001). So, Patterson's

statements are simply unbelievable because he is a conniving, self-interested manipulating agent provocateur.

Indeed, the core issue in this case involves the credibility of the government's rogue informants. The government did not trust them enough to offer either Johnson or Patterson as a witness against Young at trial or at his two sentencing hearings. Yet, the hearsay statements of these agent provocateurs have formed the basis of the enhanced sentence imposed on Young. DEA Special Agent James testified that he would not want his liberty to rest on the credibility of the testimony of informants like Johnson. Trial Tr. 158. But this is precisely what happened to Young in this case, where a preponderance of the evidence, a very low burden of proof was used to increase his exposure from 51 months to 327 months incarceration. Both Johnson and Patterson had long histories of criminal activities involving drug distribution, forgery, thievery and the like. In fact, the government agents admitted that while they were documented informants they were also trafficking in illegal drugs without the government's knowledge (i.e. double dealing). Trial Tr. 142; Sent. Tr. 14, 15 (May 2, 2001). See Pet. App. 129-132 (Young I). Even while Young's sentencing hearing was pending, the prosecutor made a Brady disclosure to Young's counsel which showed that Patterson and Johnson engaged in an illegal conspiracy to sell Johnson's efforts to set up drug buys for inmates recruited by Patterson, so that these inmates could move for a reduced prison sentences. In essence, Patterson and Johnson set up a clandestine cottage industry whereby Johnson and Patterson would sell

their deception, perjury and trafficking skills to desperate inmates seeking reduced sentences for very large sums of money. See Pet. App. 137-139 (Young I). In this context, neither the statements of Johnson or Patterson against Young could reasonably amount to clear and convincing evidence to support an enhanced sentence of Young which was seven times than the guideline penalty range for Young's offense of conviction.

Finally, the fact that Young may have been present at a 4th of July picnic with Patterson, Brownlee and scores of other persons is not an evidence of any conspiratorial involvement, and the jury rationally concluded so by rendering its verdict of not guilty as to the charge of conspiracy against Young. The government's attempt to suggest otherwise is disingenuous. Resp. 20.

Initially, the government seems to argue that Young waived his Double Jeopardy issue in this case by failing to raise it previously. Resp. 9, 10 and 11. However, the government scrupulously avoids the term "waiver." Perhaps that term is avoided because it is well settled that a person cannot waive his Double Jeopardy claim without an intentional relinquishment or abandonment of this known right under the Fifth Amendment. See Ricketts v. Adamson, 483 U.S. 1 (1987); Johnson v. Zerbst, 304 U.S. 458 (1938). In the instant case, the evidence is undisputed that Young had not voluntarily and knowingly waived his Fifth Amendment right barring Double Jeopardy.

The government reframes the first issue raised in the petition by suggesting that Young seeks to overrule statutes, which empower courts of appeal to review judgments of lower courts. In fact, the narrow issue raised in Young's first issue, regarding the government's ability to have "a second bite of the apple" after an appellate finding of insufficiency of the evidence—seeks to preserve the integrity of the court of appeal's mandate. If the government is afforded a "second bite of the apple," then it is pointless for the defendant to even raise this issue of insufficiency on appeal and a court of appeals reversal for insufficiency would be meaningless. The government could merely keep returning to the trial court until they get it right, if it is afforded "a second bite of the apple." In truth, the government has no burden of proof for a sentencing enhancement, if it is given " a second bite of the apple." No matter what is offered by the government at the initial sentencing hearing, the government may consider it merely a practice run with an opportunity to return after remand to try again, and again, and again, until the sufficient evidence is presented. The government has it at its disposal a pool of desperate criminal informers anxious to sing a tune, which may lead to his or her freedom.

There is no rational or legal reason why the government is barred from following this procedure at a trial but not barred from doing so at a sentencing hearing. Unless, this Court closes this loophole in Due Process, the government will have no burden of proof at the defendant's sentencing and an appeal by a defendant based on insufficiency will be reduced to a fool's errand.

The government argues that there is agreement among the circuit on this issue. Resp. 12. Then the government proceeds to argue against itself by describing the variations on this theme among nearly all the courts of appeal. Indeed the issue is so unsettled that the ruling in Young I and II by the Eleventh Circuit conflicts with its own prior ruling in United States v. Dunlap, 279 F. 3d 965, 967 (11th Cir. 2002) (in Dunlap the Eleventh Circuit held that the government could present additional evidence at resentencing to prove sentencing enhancement because, unlike in Young, defense counsel failed to object to the lack of sufficient evidence).

With respect to Young's second issue in his petition, regarding a sentencing enhancement so enormous that it amounts to "a tail which wags the dog of the substantive offense," once again the government argues against itself. In United States v. Reed, No. 99-1096 (11th Cir. filed Dec. 29, 1999) the government sought this Court's resolution of this long unsettled issue. Apparently, the government believes a decision from the High Court on this issue was long overdue in 1999, but not so in 2003.

This Court in United States v. Watts, 519 U.S. 148, 157 (1997) acknowledged that there is a split in the Circuits as to whether relevant conduct must be proven by clear and convincing evidence in extreme cases. Indeed, this Court raised the issue seventeen years ago in McMillan v. Pennsylvania , 477 U.S. 79, 88 (1986). This issue is not going to go away. See Reed v. United States, 528 U.S. 1163 (2000). The time to resolve this important sentencing issue is long overdue.

The sentencing hearing in federal court has evolved to become the most significant proceeding in a criminal defendant's life. All the legal safeguards of evidence and procedure associated with a trial melt away at this stage or appear in reduced forms. The outrageous tragedy plaguing our system of justice involves tens of thousands of federal prisoners who have been convicted of relatively minor offenses, but who are sentence to 20, 30, 50 years in prison based often times on the hearsay statements of double-dealing, malevolent agent provocateurs like Patterson and Johnson who would say anything to save their own necks or to receive payments of large sums of money from the government. For thirty years the federal courts have sought to bring Due Process to sentencing, this case presents this Court the opportunity to speak to two open questions, which demand resolutions. When a person is convicted a relatively minor offense, like the sale of one ounce of heroin, and he is sentenced to 327 months in prison, like Willie Young, then the government should rely on more than merely the preponderance of the evidence standard, and the government should not be given successive opportunities to meet its burden of proof—that is, if the sentencing process is to be fair.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully request that his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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